

Document:-
A/CN.4/SR.2204

Summary record of the 2204th meeting

Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
1990, vol. I

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"The Special Rapporteur, referring to views expressed by several members, recalled that the Commission's duty was to comply with the mandate assigned to it by the General Assembly and reaffirmed in annual Assembly resolutions on the report of the Commission. The meaning and orientation of the topic, as well as its content, had been defined by the Commission at its thirty-ninth session, in 1987, when it had approved the outline of the subject-matter which it had requested the Special Rapporteur to submit to it. The Special Rapporteur noted that many other topics on the Commission's agenda also encompassed aspects regulated by existing instruments. Referring to the Commission's role in the codification of international law, he stated that it would be useful to systematize and organize rules on the topic. Indeed, a close look at the international situation showed that there were many gaps to be filled and problems to be solved. For example, he noted, many problems had arisen in recent years between some organizations and host countries in connection with the rights and obligations of officials, experts and persons having official business with the organizations. The Special Rapporteur therefore emphasized the importance of considering the draft articles fully and referring them, following such consideration, to the Drafting Committee."

69. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the revised text of paragraph 14.

It was so agreed.

Paragraph 14, as amended, was adopted.

Section B, as amended, was adopted.

Chapter VI of the draft report, as amended, was adopted.

CHAPTER II. Draft Code of Crimes against the Peace and Security of Mankind (continued) (A/CN.4/L.447 and Add.1 and 2 and Add.2/Corr.1 and Add.3)

D. Draft articles on the draft Code of Crimes against the Peace and Security of Mankind (A/CN.4/L.447/Add.2 and Corr.1)

SUBSECTION 1 (Texts of the draft articles provisionally adopted so far by the Commission)

Section D.1 was adopted.

SUBSECTION 2 (Texts of draft articles 16, 18 and X, with commentaries thereto, provisionally adopted by the Commission at its forty-second session)

Commentary to article 16 (International terrorism)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

70. Mr. TOMUSCHAT said that the second sentence was too general and therefore inaccurate. He proposed that the words "as defined in article 16" be added after the words "International terrorism".

Paragraph (2) was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

71. Mr. EIRIKSSON (Rapporteur) submitted the following revised text for the first two subparagraphs of paragraph (4):

"Paragraph 2 concerns the participation of individuals in acts of terrorism by agents or representatives of the State. It does not cover acts of terrorism committed by individuals which have no link with international acts of terrorism as defined in paragraph 1.

"Notwithstanding the proportions which the phenomenon has assumed nowadays, particularly in the framework of certain entities (terrorist organizations or groups, which are usually motivated by the desire for gain), and the danger which it represents for States (certain organizations have financial or military means superior to those of certain States), it has not seemed possible to consider terrorism by individuals as belonging to the category of crimes against peace, to the extent that such activities are not attributable to a State. Certain members of the Commission, however, consider that terrorism by individuals should be covered."

72. Mr. KOROMA proposed that the bracketed phrase "certain organizations have financial or military means superior to those of certain States", in the second subparagraph of that text, be deleted. Care must be taken not to confer any kind of respectability on the organizations in question.

73. Mr. THIAM (Special Rapporteur) said that he did not object to the deletion of that phrase.

Mr. Koroma's amendment was adopted.

74. Mr. TOMUSCHAT, supported by Mr. MAHIU, said that he did not see why a sentence such as the last sentence of the second subparagraph should be included in the commentary to an article.

75. Mr. BENNOUNA said that it was in fact unusual to recall the position taken by members of the Commission in the commentary to an article. He proposed that the sentence in question be deleted.

76. Mr. THIAM (Special Rapporteur) said that he did not object to the deletion of that sentence.

Mr. Bennouna's amendment was adopted.

77. The CHAIRMAN suggested that the consideration of paragraph (4) be continued at the next meeting.

It was so agreed.

The meeting rose at 1.05 p.m.

2204th MEETING

Friday, 20 July 1990, at 3.10 p.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Eiriksson, Mr. Fran-

cis, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

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**Draft report of the Commission on the work of its
forty-second session (concluded)**

CHAPTER II. Draft Code of Crimes against the Peace and Security of Mankind (concluded) (A/CN.4/L.447 and Add.1 and 2 and Add.2/Corr.1 and Add.3)

D. Draft articles on the draft Code of Crimes against the Peace and Security of Mankind (concluded) (A/CN.4/L.447/Add.2 and Corr.1)

SUBSECTION 2 (Texts of draft articles 16, 18 and X, with commentaries thereto, provisionally adopted by the Commission at its forty-second session) (concluded)

Commentary to article 16 (International terrorism) (concluded)

Paragraph (4) (concluded)

1. Mr. THIAM (Special Rapporteur) proposed that the first sentence of the third subparagraph of paragraph (4) be replaced by the following text: "Paragraph 2 deals with terrorist activities in which individuals acting with the support of the State are involved. But the question arises whether, in such situations, the individuals concerned should not be considered as accomplices."

2. Mr. MAHIOU said that he could accept the Special Rapporteur's amendment.

3. Mr. BENNOUNA was also willing to accept the amendment, but emphasized that it must be clear from the text that the Commission would also be reverting to paragraph 2 of article 16 in connection with crimes against humanity. He proposed that the second, third and fourth sentences of the third subparagraph of paragraph (4) be replaced by the following text: "Consequently, paragraph 2 will have to be re-examined in the light of the future provisions on complicity. Furthermore, the Commission intends to revert to international terrorism by individuals when it examines provisions relating to crimes against humanity."

4. Mr. THIAM (Special Rapporteur) supported Mr. Bennouna's amendment.

5. Mr. PAWLAK supported both the proposed amendments.

The amendments by the Special Rapporteur and Mr. Bennouna were adopted.

6. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve the revised text of the first two subparagraphs of paragraph (4) submitted by the Rapporteur at the previous meeting (para. 71), as amended by Mr. Koroma and Mr. Bennouna at that meeting, and the third subparagraph as amended at the present meeting by the Special Rapporteur and Mr. Bennouna.

It was so agreed.

Paragraph (4), as amended, was approved.

The commentary to article 16, as amended, was approved.

Commentary to article 18 (Recruitment, use, financing and training of mercenaries)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

7. Mr. EIRIKSSON (Rapporteur) referred to the statement in the second subparagraph that "Article 47 of Additional Protocol I is an instrument of humanitarian law intended to grant mercenaries minimum protection". That sounded derogatory, and he would prefer the last part of the sentence to read: "... intended to grant mercenaries the minimum protection to which they are entitled".

8. Mr. THIAM (Special Rapporteur) said he thought that the existing wording was an adequate description of the purpose of Additional Protocol I.

9. Mr. TOMUSCHAT said that he, too, preferred the existing formulation. It was unnecessary to add anything, since the protection afforded to mercenaries by article 47 of Additional Protocol I already constituted an entitlement. However, the second subparagraph should mention the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

10. Furthermore, the 1974 Definition of Aggression¹ did not define mercenarism as a constituent element of aggression. It referred, in article 3 (g), to the "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries". That was not the same as defining mercenarism as a constituent element of aggression.

11. Mr. JACOVIDES said he thought that the sending of mercenaries had perhaps become a constituent element of aggression.

12. Mr. THIAM (Special Rapporteur) said that, practically speaking, there was no difference between the use and the sending of mercenaries.

13. Mr. MAHIOU pointed out that the word "mercenarism" did not appear in existing treaty texts. It would be better to keep to the language of the instruments mentioned in the commentary. It was true, as the Special Rapporteur had said, that the scope of those instruments was not the same, but the common element was the attempt to make mercenarism a crime. There seemed to be something missing in paragraph (2).

14. Mr. PELLET said that the commentary should point to the difference between Additional Protocol I to the 1949 Geneva Conventions and the 1989 Convention on mercenarism. The latter was closer to the subject-matter of article 12 of the draft code. In the French text of the commentary to article 18, Protocol I was referred to in the past tense, although it was still in force.

¹ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

15. Mr. THIAM (Special Rapporteur) agreed that the present tense should be used. As to the Definition of Aggression, it did in fact define mercenarism as one of the constituent elements of aggression, although it was only with the 1989 Convention that mercenarism had become an independent crime. Instead of using the words "a constituent element of aggression", the third sentence of the second subparagraph of paragraph (2) could speak of "one of the constituent elements of aggression".
16. Mr. AL-QAYSI disagreed. The constituent elements of aggression were set out in article 2 of the Definition of Aggression; the mercenary activities mentioned in article 3 were listed as examples of acts of aggression, subject to the provisions of article 2. To ensure consistency with the Definition of Aggression and with article 12 of the draft code, the third sentence of the second subparagraph of paragraph (2) should read: "The Definition of Aggression treats mercenarism subject to certain qualifications, as an example of an act of aggression."
17. Mr. THIAM (Special Rapporteur) proposed, in the light of Mr. Al-Qaysi's objection, that the sentence in question should read: "The Definition of Aggression makes mercenaries one of the constituent elements of aggression." The list of acts in the Definition of Aggression was intended to be illustrative, not exhaustive. It certainly included the sending or armed bands or mercenaries.
18. Mr. AL-QAYSI said that there was an important nuance which must be brought out. According to the Definition of Aggression, the sending of mercenaries would be an act of aggression if certain conditions—stated in article 2—were fulfilled. To say that mercenarism was a constituent element of aggression was a different matter.
19. Mr. McCAFFREY agreed: a constituent element of a crime was an element which must be present for the crime to exist. According to the Definition of Aggression, the sending of mercenaries was an act of aggression. He could accept Mr. Al-Qaysi's proposal, which included the important rider "subject to certain qualifications".
20. Mr. MAHIOU also supported Mr. Al-Qaysi's proposal. To say that mercenarism was a constituent element of aggression would mean that, if it was not present, there was no aggression. The existing wording of the commentary was ambiguous and could lead to difficulties.
21. Mr. BENNOUNA said he agreed with Mr. Mahiou that there was something missing in the existing wording of paragraph (2). Three international instruments containing provisions on mercenarism were referred to. It should therefore be explained how article 12 of the draft code related to those instruments, and what was new in it. It should also be stated that the 1989 Convention made mercenarism an independent crime.
22. Mr. THIAM (Special Rapporteur) said that he could accept Mr. Al-Qaysi's proposal. A sentence referring to the 1989 Convention, along the lines suggested by Mr. Bennouna, should also be added.
23. The CHAIRMAN suggested that paragraph (2) be approved, on the understanding that the text would be amended in accordance with the proposals made.
- It was so agreed.*
- Paragraph (2), as amended, was approved.*
- Paragraph (3)
24. Mr. TOMUSCHAT said that, in the second subparagraph, beginning "This is what distinguishes mercenarism . . .", it was not clear what the word "This" referred to.
25. Mr. THIAM (Special Rapporteur) said that a State had the right to engage mercenaries, even foreign ones, to fight its wars; but "mercenarism under the present draft article" meant mercenarism directed against a State for the purpose of destabilizing it, or used to undermine the right of a people to self-determination.
26. Mr. BENNOUNA thought that paragraph (3) was ambiguous. Why not refer to "the crime contemplated in the present article"? It would be preferable to avoid the term "mercenarism", which had no precise legal meaning.
27. Mr. EIRIKSSON (Rapporteur) thought that paragraph (3) was a good reflection of the work done so far, but it could be improved. The first subparagraph should make it clear that article 18 did not refer to mercenaries themselves, but to the recruitment, use, financing and training of mercenaries. Secondly, it should state that the persons responsible were agents or representatives of States. Finally, it should specify that the activities of mercenaries were directed against a State or against the exercise of the right of a people to self-determination—a right recognized by international law, as the Commission had stated in articles 14 and 15 of the draft code, adopted at its previous session.
28. The commentary should also make it clear that mercenaries were motivated by gain, whereas the motives of those who hired them were political.
29. Mr. MAHIOU said it should be made absolutely clear that the activity characterized as a crime in article 18 was not mercenarism itself, but the use of mercenaries by agents of a State. The Special Rapporteur would no doubt see to that point in the final wording.
30. The CHAIRMAN suggested that the Commission should suspend consideration of paragraph (3) for the time being and that the Rapporteur should draft a new text in the light of the proposals made.
- It was so agreed.*
31. Mr. BARSEGOV said that, in his view, members should not be raising substantive points at the current stage of proceedings.
- Paragraph (4)
32. Mr. THIAM (Special Rapporteur) drew attention to the following changes. The first sentence would read: "Paragraph 2 defines the mercenary himself, following the definition of a mercenary in article 1 of the 1989 Convention." The rest of the paragraph would be deleted.

33. Mr. EIRIKSSON (Rapporteur) said that it was necessary to insert a reference to armed conflict. He therefore proposed that the first two sentences of paragraph (4) should read: "Paragraph 2 defines the mercenary himself, following the definition of a mercenary in article 1 of the 1989 Convention and article 47 of Additional Protocol I to the 1949 Geneva Conventions. This definition refers to mercenaries recruited to fight in an armed conflict."

34. Mr. TOMUSCHAT said that he doubted the wisdom of making such a rigid distinction between paragraphs 2 and 3 of article 18. An attack designed to undermine the territorial integrity of a State could occur during an armed conflict.

35. Mr. EIRIKSSON (Rapporteur) said that, at the current stage, it would be sufficient to say that paragraph 2 dealt with armed conflicts and, in the commentary to paragraph 3, simply to use the language of paragraph 3 (a) of article 18.

36. Mr. THIAM (Special Rapporteur) expressed agreement with the Rapporteur's views. In reply to Mr. Tomuschat, he suggested that the commentary might state that paragraph 2 dealt with armed conflicts, whereas paragraph 3 dealt with situations independent of any armed conflict.

37. The CHAIRMAN suggested that the Special Rapporteur's proposal be transcribed for members to consider. In the meantime, consideration of paragraph (4) would be suspended.

It was so agreed.

Paragraph (5)

38. Mr. EIRIKSSON (Rapporteur) said that the second sentence was somewhat inelegant and proposed that it be amended to read: "Only his foreign nationality is relevant in this connection." He would like to know why the mercenary's foreign residence was not at issue.

39. Mr. BENNOUNA said that the Rapporteur's question raised complex legal problems. To simplify, it would be sufficient to state that the phrase "recruited locally or abroad" should be read with reference to paragraph 2 (c) of article 18. He thought that Mr. Tomuschat's comment concerning the distinction between paragraphs 2 and 3 (see para. 34 above) had been very pertinent, since there could be situations of undeclared war.

40. After further discussion, the CHAIRMAN suggested that the Rapporteur, the Special Rapporteur and the Chairman of the Drafting Committee should meet in informal consultation to draft new texts for paragraphs (3) to (7) of the commentary, taking into account the proposals made.

It was so agreed.

Commentary to article X (Illicit traffic in narcotic drugs)

Paragraph (1)

41. Mr. THIAM (Special Rapporteur) noted that, in the first sentence of the French text, the word *le* before *crime* should read: *de*.

42. Mr. MAHIOU, supported by Mr. PAWLAK and Mr. EIRIKSSON (Rapporteur), said it should be made absolutely clear that the crime of traffic in narcotic drugs was being introduced into the draft code as a crime against humanity. The necessary clarification might read: "In article X, the Commission is introducing the traffic in narcotic drugs into the code as a crime against humanity." That text might appear as a footnote to article X.

43. Mr. McCAFFREY agreed with that suggestion. In order to help the reader further, he suggested adding the heading "Crimes against peace" before article 16 and the heading "Crimes against humanity" before article X.

44. Mr. MAHIOU said that Mr. McCaffrey's suggestion was an excellent one.

45. He proposed that the following new sentence be added at the beginning of paragraph (1): "In adopting article X, the Commission has provisionally confined itself to illicit drug trafficking as a crime against humanity, even though the Special Rapporteur had also submitted a draft article on illicit drug trafficking as a crime against peace."

46. Mr. THIAM (Special Rapporteur) pointed out that, in his eighth report, draft article Y dealt with illicit traffic in narcotic drugs as a crime against humanity and draft article X dealt with it as a crime against peace (see 2150th meeting, para. 14).

47. Mr. TOMUSCHAT suggested that, at the end of the first sentence, the words "mankind as a whole" be replaced by "the international community".

48. Mr. BENNOUNA said that the third sentence should be recast, bearing in mind, among other things, that article X did not simply reiterate the terms of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. He suggested the following text: "Article X goes one step further by making the crime an international one, subject to certain qualifications."

49. Mr. THIAM (Special Rapporteur) said he could accept that amendment, but must point out that the 1988 Convention did not make illicit traffic in narcotic drugs an international crime. The Convention did not alter the status of the crime as a crime under national law; its purpose was to organize co-operation between States in the search for criminals and the definition of the crime.

50. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (1) with the amendments proposed by Mr. Mahiou (para. 45 above), Mr. Tomuschat and Mr. Bennouna.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

51. Mr. EIRIKSSON (Rapporteur) suggested that, in the third sentence, the term "individuals" be replaced by the words "private individuals". The sentence drew

a distinction between "agents of the State" and "individuals", and since agents of the State were also individuals, it was necessary to be more precise.

52. Mr. TOMUSCHAT proposed the deletion of the last two sentences, which related to "organizations, associations and other bodies". The Commission had taken no decision concerning collective responsibility. The whole discussion had been confined to the criminal responsibility of individuals.

53. Mr. THIAM (Special Rapporteur) said that the two sentences in question should be retained. They did not establish any collective responsibility; they merely dealt with the acts of private persons acting through organizations or associations such as companies formed under private law. The General Assembly had requested the Commission to deal with the problem of acts committed through entities when it had adopted resolution 44/39 of 4 December 1989, the title of which referred to the "International criminal responsibility of individuals and entities engaged in illicit trafficking". It was accordingly quite correct to suggest that such bodies corporate or legal persons as companies be given the same treatment as individuals under the draft code.

54. Mr. BENNOUNA pointed out that the Commission had not discussed the problem of attaching criminal responsibility to legal persons. Consequently, the last two sentences of paragraph (3) should be either recast or deleted.

55. Mr. JACOVIDES said that the sentences in question should specify that they related to the activities of private individuals acting within or on behalf of such entities as organizations or associations.

56. Mr. MAHIU said that the question of the criminal responsibility of legal persons had been discussed, but no conclusion had been reached. The best course would be to adopt the idea put forward by Mr. Jacovides and amend the penultimate sentence to read: "The term 'individuals' includes persons acting for or on behalf of organizations, associations and other bodies . . .". A similar change would be made in the last sentence, which would then read: "It also covers persons acting in the framework of financial institutions . . .".

57. Mr. THIAM (Special Rapporteur) accepted those proposals.

58. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (3) with the amendments proposed by the Rapporteur and Mr. Mahiou.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

59. Mr. TOMUSCHAT said that the expression "for the purposes of an ethnic, racial or other group", in the last sentence, was difficult to understand. Did it mean that there could be an intent to supply a particular

group with drugs with a view to annihilating that group?

60. Mr. THIAM (Special Rapporteur) said that the expression was intended to cover the quite conceivable case of a particular group that was subject to discrimination in a given country being induced to take drugs. To meet Mr. Tomuschat's point, he suggested that the expression in question be replaced by "for the purpose of impairing the physical integrity of members of an ethnic, racial or other group".

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraphs (6) to (8)

Paragraphs (6) to (8) were approved.

Paragraph (9)

61. Mr. MAHIU proposed that, in the second sentence, the words "for example" should be added before the words "for the preparation".

It was so agreed.

62. Mr. PAWLAK proposed that a sentence be added referring to the relevant international instruments on illicit traffic in narcotic drugs.

It was so agreed.

Paragraph (9), as amended, was approved.

The commentary to article X, as amended, was approved.

Commentary to article 18 (Recruitment, use, financing and training of mercenaries) (concluded)

Paragraphs (3) to (7) (concluded)

63. The CHAIRMAN said that the Rapporteur, together with the Special Rapporteur and the Chairman of the Drafting Committee, had prepared a revised text for paragraphs (3) to (6) to replace the original paragraphs (3) to (7). He invited the Rapporteur to present the revised text.

64. Mr. EIRIKSSON (Rapporteur) read out the following revised text:

"(3) Paragraph 1 sets the scope and limits of the crime dealt with in the article. It makes clear, first, that the crime is not constituted by the activities of the mercenaries themselves but rather by the acts of recruiting, using, financing or training of mercenaries. Secondly, the only persons to whom the crime can be attributed are agents or representatives of a State. Thirdly, to fall under the definition, the acts must have one of two objectives: the mercenaries must be recruited, used, financed or trained either for activities directed against another State, or for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination as recognized under international law. With respect to the phrase 'right of peoples to self-determination as recognized under international law', reference may be made to the terms of paragraph 7 of article 12 (Aggression) and to the use of the phrase 'right of peoples to self-determination as enshrined in the Charter of the United Nations' in article 14 (Inter-

vention) and article 15 (Colonial domination and other forms of alien domination).*

“(4) Paragraph 2 defines the mercenary himself, following the definition in paragraph 1 of article 1 of the 1989 Convention and paragraph 2 of article 47 of Additional Protocol I. The definition refers to a person recruited to fight in an armed conflict.

“(5) Paragraph 3, derived from paragraph 2 of article 1 of the 1989 Convention, defines an additional category of mercenaries, i.e. those recruited for the purpose of participating in a concerted act of violence aimed at overthrowing a Government or otherwise undermining the constitutional order of a State or undermining the territorial integrity of a State. The expression ‘in any other situation’ contrasts this category with that referred to in paragraph 2.

“(6) In recent years, the activities of this kind of mercenary have greatly increased in the third world.

* “See section D.1 above and the commentaries to articles 14 and 15 (*Yearbook . . . 1989*, vol. II (Part Two), pp. 69-70).”

65. Mr. TOMUSCHAT said that the revised text would require some drafting changes to improve the style.

66. The CHAIRMAN suggested that the Commission approve the revised text of paragraphs (3) to (6), on the understanding that the Rapporteur would make any necessary drafting changes in consultation with the Secretariat.

It was so agreed.

Paragraphs (3) to (6), as amended, were approved.

The commentary to article 18, as amended, was approved.

Section D.2, as amended, was adopted.

Chapter II of the draft report, as amended, was adopted.

The draft report of the Commission on the work of its forty-second session as a whole, as amended, was adopted.

Closure of the session

67. After an exchange of congratulations and thanks, the CHAIRMAN declared the forty-second session of the International Law Commission closed.

The meeting rose at 5.45 p.m.